

Department of Homeland Security Policy Answers to Law Enforcement Reasons for Not Certifying¹

By: Natalia Lee, Daniel J. Quinones, Nawal Ammar, Aditi Kumar & Leslye E. Orloff
The National Immigrant Women's Advocacy Project,
American University, Washington College of Law²
September 27, 2013

A nationwide survey of organizations serving immigrant victims of domestic violence, sexual assault and human trafficking was completed electronically by 722 non-governmental and governmental service providers from across the United States January 2013 and March 2013. Survey participants provided their experiences from working on over 22,000 cases of immigrant crime victims who were survivors of domestic violence, sexual assault, human trafficking and other crimes covered by the U visa.³ Victim advocacy and legal services organizations responding to the survey were asked to identify the reasons agencies that were authorized by statute and DHS regulations to sign certifications gave for declining to certify. Survey participants were also asked to indicate the number of their cases declined for each stated reason. In addition, we reviewed U visa certification policies to identify provisions included in policies that were contrary to DHS published policies, regulations, advise and training materials on U visa certification.

The following table summarizes the most frequent reasons why certifying agencies choose not to sign certifications. There were 22 reasons that law enforcement gave to the provided or included in their agency certification policies of not signing certifications. The total number of reported instances in the survey in which law enforcement provide to survey participants reasons for not certifying was 4,447. It is important to note that agencies were able to select multiple reasons that were given in any particular case, so the total reflects the number of times a response was given, not the number of cases when certification was denied. The most frequent reasons are listed below, and the percentages are those of all cases reported in response to this question.

¹ Copyright © The National Immigrant Women's Advocacy Project, American University, Washington College of Law 2013. This project was supported by Grant No. 2009-DG-BX-K018 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the SMART Office, and the Office for Victims of Crime. Points of view or opinions in this document are those of the author and do not represent the official position or policies of the United States Department of Justice

² Excerpt from Natalia Lee, Daniel J. Quinones, Nawal Ammar & Leslye E. Orloff, National Survey of Service Providers on Police Response to Immigrant Crime Victims, U Visa Certification and Language Access. (April 16, 2013)

³ The U Visa regulations define the crimes for which U visa protection is available as follows: "Qualifying criminal activity is defined by statute to be "activity involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes...The list of qualifying crimes represents the myriad types of behavior that can constitute domestic violence, sexual abuse, or trafficking, or are crimes of which vulnerable immigrants are often targeted as victims." *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*. Vol. 72, No. 179 Fed. Reg. 53014, 53015 September 17, 2007; The Violence Against Women Act of 2013 added stalking to the list of criminal activities covered by the U visa. Violence Against Women Act, Pub. L. No. 113-4, § 802, 127 Stat. 24 (2013).

| Reasons Certifiers Give for Not Signing Certifications | |
|---|-------------|
| 1. The criminal was not prosecuted | 536 (12.1%) |
| 2. The crime happened too long ago | 534 (12.0%) |
| 3. The criminal was not arrested | 346 (7.8%) |
| 4. The victim's case was closed | 322 (7.2%) |
| 5. The victim did not show enough assistance to law enforcement | 306 (6.9%) |
| 6. Law enforcement has the discretion not to certify | 300 (6.7%) |
| 7. The victim did not have any or enough injuries | 293 (6.6%) |
| 8. The certifier did not feel comfortable granting legal status | 281 (6.3%) |
| 9. The agency does not know they can certify | 247 (5.6%) |
| 10. Victim may stop cooperating after U visa certification is signed | 225 (5.1%) |
| 11. The criminal was not identified | 173 (3.9%) |
| 12. Victim is a child and the parent is seeking certification | 139 (3.1%) |
| 13. The criminal has not been convicted | 136 (3.1%) |
| 14. The victim never testified | 133 (3.0%) |
| 15. Agency did not want to certify due to concern about liability | 130 (2.9%) |
| 16. Victim has a removal order or is in removal proceedings | 130 (2.9%) |
| 17. Victim no longer in the U.S. | 114 (2.6%) |
| 18. Agency has no certification policy | 102 (2.3%) |

The above listed responses given as reasons for not signing certifications seem to reflect misunderstandings and misperceptions certifying agencies have about legal parameters and requirements about the U Visa and the certification process.⁴ The following are quotes and/or citations from DHS training materials for law enforcement on U Visa certification that make it clear that all but one (No. 6) of the reasons for not signing certifications listed above is not a valid reason for failing to sign a U Visa certification. DHS policies and regulations and the U visa statute are quoted providing documentation about why 20 out of 22 the following reasons for not signing U visa certifications are inconsistent with DHS' views on the following issues:

1. Denial of the certification because the criminal was not prosecuted:

⁴ These findings are similar to OVW grantee reports. See, Giselle Hass, Karen Monahan, Edna Yang and Leslye E. Orloff, U-Visa Legal Advocacy: Overview of Effective Policies and Practices (November 14, 2012).

As stated above, DHS points out that “[a]n agency may sign a declaration or certification if the case is closed, or if a prosecution, arrest, or conviction was not made. Formal charges or the launching of a formal investigation is not required.”⁵ In addition, the U-Visa Guide by DHS states that “there is no requirement that an arrest, prosecution, or conviction occur for someone to be eligible for a U visa. While there is no requirement for the victim to testify at a trial to be eligible for a U visa, if the victim is requested to testify, he or she cannot unreasonably refuse to cooperate with law enforcement. If the victim unreasonably refuses to testify, the law enforcement agency should notify USCIS and may withdraw the previously signed Form I-918B.”⁶

2. Denial of the certification because the crime happened too long ago:

DHS explains in its guide that “there is no statute of limitations on a victim's helpfulness to law enforcement. A declaration or certification may be provided for cases that are closed or investigations for crimes that occurred months or years ago, as long as the victim was helpful to law enforcement.”⁷

3. Denial of the certification because the criminal was not arrested:

As mentioned above, the U Visa Guide by DHS states that “there is no requirement that an arrest, prosecution, or conviction occur for someone to be eligible for a U visa.”⁸ The Department of Homeland Security has outlined the requirements needed to gaining certification. The “U Visa Law enforcement Certification Resource Guide” published by DHS clearly states that “a current investigation, the filing of charges, a prosecution or conviction are not required to sign the law enforcement certification,” and that there is no statute of limitations for signing the certification.⁹

4. Denial of the certification because the case was closed:

The Department of Homeland Security (DHS) states that “[a]n agency may sign a declaration or certification if the case is closed, or if a prosecution, arrest, or conviction was not made. Formal charges or the launching of a formal investigation is not required.”¹⁰ On its U-Visa

⁵ DEP’T OF HOMELAND SEC. *DHS guide on Immigration Relief for Victims of Human Trafficking and other Crimes Information for Law Enforcement Officials*, available at, <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/tools/police-prosecutors/QA-for-Law-Enforcement.pdf/view>

⁶ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 11, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visas_certification_guide.pdf/view

⁷ DEP’T OF HOMELAND SEC. *DHS guide on Immigration Relief for Victims of Human Trafficking and other Crimes Information for Law Enforcement Officials*, available at, <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/tools/police-prosecutors/QA-for-Law-Enforcement.pdf/view>

⁸ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 11, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visas_certification_guide.pdf/view

⁹ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 4, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visas_certification_guide.pdf/view

¹⁰ DEP’T OF HOMELAND SEC. *DHS guide on Immigration Relief for Victims of Human Trafficking and other Crimes Information for Law Enforcement Officials*, available at, <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/tools/police-prosecutors/QA-for-Law-Enforcement.pdf/view>

Guide, DHS also establishes that “...law enforcement can still complete Form I-918B for an investigation or case that is closed... A crime victim could be eligible to receive U visa certification when, for example, the case is closed because the perpetrator could not be identified; a warrant was issued for the perpetrator but no arrest could be made due to the perpetrator fleeing the jurisdiction or fleeing the United States, or has been deported; before or after the case has been referred to prosecutors, as well as before or after trial whether or not the prosecution resulted in a conviction.”¹¹

5. Denial of the certification because the victim did not show enough assistance to law enforcement:

The statute that created the U visa and the regulations implementing the U visa make it clear that immigrant crime victims who call the police for help and report criminal activities committed against them qualify for the U visa and can receive certification. Both the U visa statute and regulations specify that assistance with “detection” of a criminal activity is sufficient for both certification and issuance of the U visa.

When Congress created the U visa as part of the Violence Against Women Act of 2000 the statute included Congressional findings about the purpose of the U visa. Section 1513(1)¹² of the VAWA 2000 highlighted the fact that “[a]ll women and children who are victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement.” The U visa was created to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes...offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement officials to better serve immigrant victims and prosecute crimes committed against aliens.” Congress went on to state that creating the U visa will “facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status.”

The U visa regulations also discuss the fact that helpfulness in “detection” of criminal activity is sufficient for certification and issuance of the U visa. The U visa regulations define the term “investigation or prosecution ... to include the detection of qualifying criminal activity because the detection of criminal activity is within the scope of a law enforcement officer’s investigative duties.”¹³ The preamble to the regulations go on to state: “By allowing an individual to petition for U nonimmigrant status upon a showing that he or she may be helpful at

¹¹ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 10, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

¹² Violence Against Women Act of 2000, Pub. L. No. 106-386 (2000).

¹³ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule; 72 Fed. Reg. 53014, 53020 (September 12, 2007)

some point in the future, USCIS believes that Congress intended for individuals to be eligible for U nonimmigrant status at the very early stages of an investigation.”¹⁴

Additionally, although U visa recipients must continue to cooperate with reasonable requests for cooperation from law enforcement, the state and the regulations contain an exception to this requirement for immigrant crime victims whose refusal to cooperate is not unreasonable. DHS regulations provide “that the determination of whether an alien’s refusal to provide assistance was unreasonable will be based on all available affirmative evidence and take into account the totality of the circumstances and factors such as general law enforcement, prosecutorial, and judicial practices; the kinds of assistance asked of other victims of crimes involving an element of force, coercion, or fraud; the nature of the request to the alien for assistance; the nature of the victimization; the applicable guidelines for victim and witness assistance; and the specific circumstances of the applicant, including fear, severe trauma (either mental or physical), and the age and maturity of the applicant.”¹⁵ Thus, a victim’s refusal to provide ongoing help should not result in denial of a U visa certification if the victim’s refusal was not unreasonable upon consideration of the totality of circumstances in the case.

6. Law enforcement has the discretion not to certify

“Although a law enforcement certification is a required part of a victim’s petition for a U visa, law enforcement officers cannot be compelled to complete a certification. Whether a certifying law enforcement agency signs a certification is at the discretion of that law enforcement agency... The law enforcement certification validates the role the victim has had or will have in being helpful to the investigation or prosecution of the case; therefore, it is important that the law enforcement agency complete certifications on a case-by-case basis. Without a completed U visa certification, the victim will not be eligible for a U visa.”¹⁶

7. The victim did not have any injuries or did not have enough injuries

“USCIS will make the determination as to whether the victim has met the “substantial physical or mental” standard on a case-by-case basis during its adjudication of the U visa petition. Certifying law enforcement agencies do not make this determination. Certifying agencies may, however, provide any information the agency deems relevant regarding injuries or abuse on Form I-918B.... Form I-918B asks that law enforcement provide information about any injuries the law enforcement agency knows about or has documented. While this provides some of the evidence USCIS will use to make the substantial physical or mental abuse determination, the U visa petitioner has the burden of proving the substantial physical or emotional abuse. USCIS adjudication officers receive extensive training in statutory and regulatory requirements in determining whether a victim has suffered substantial physical or mental abuse. Factors that USCIS uses to make this determination are: the nature of the injury inflicted; the severity of the perpetrator’s conduct; the severity of the harm suffered; the duration of the infliction of the

¹⁴New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule; 72 Fed. Reg. 53014, 53034 (September 12, 2007)

¹⁵ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75540, 75547 (December 12, 2008); New 8 CFR 245.24(a)(5).

¹⁶ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 4, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim.”¹⁷

8. Denial of the certification because the Certifier did not feel comfortable granting legal status:

The Certifier does **NOT** grant legal status upon signing Form I-918. As stated by DHS in its informational brochure for law enforcement “a signed law enforcement declaration or certification is just one piece of evidence submitted as part of a T or U visa application. Only USCIS has the authority to approve T and U visa applications and provide immigration benefits.”¹⁸ DHS further states in its certification guide “USCIS is the federal component of DHS responsible for approving and denying immigration benefits and status, including the U visa. Federal, State and local law enforcement agencies **do not** grant or guarantee a U visa or any other immigration status by signing a U visa certification (Form I-918B). Only USCIS may grant or deny a U visa after a full review of the petition to determine whether all the eligibility requirements have been met and a thorough background investigation”¹⁹

9. The agency does not know they can certify

“A federal, state, local law enforcement agency, prosecutor, judge, or other authority that has the responsibility for the investigation or prosecution of a qualifying crime or criminal activity is eligible to sign Form I-918B. This includes agencies with criminal investigative jurisdiction in their respective areas of expertise, including but not limited to child and adult protective services, the Equal Employment Opportunity Commission, and Federal and State Departments of Labor.”²⁰

10. Victim may stop cooperating after U visa certification is signed

Immigrant crime victims who receive U visas “have an ongoing responsibility to cooperate with the certifying official while in U” visa status.²¹ The victim “cannot unreasonably refuse to cooperate with law enforcement.”²² For DHS regulations on unreasonable refusal to cooperate see the discussion in section 5 above.

11. The criminal was not identified

“Many instances may occur where the victim has reported a crime, but an arrest or prosecution cannot take place due to evidentiary or other circumstances. Examples of this include, but are not limited to, when the perpetrator has fled or is otherwise no longer in the

¹⁷ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 11, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

¹⁸ DEP’T OF HOMELAND SEC. *DHS guide on Immigration Relief for Victims of Human Trafficking and other Crimes Information for Law Enforcement Officials*, at 1 available at, <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/tools/police-prosecutors/QA-for-Law-Enforcement.pdf/view>

¹⁹ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 4, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

²⁰ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 9, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

²¹ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule; 72 Fed. Reg. 53014, 53019 (September 12, 2007)

²² DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 11, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

jurisdiction, the perpetrator cannot be identified, or the perpetrator has been deported by federal law enforcement officials.”²³

12. Victim is a child and the parent is seeking certification

“In many cases where a child is the victim of a crime, the child may not be able to provide law enforcement with adequate assistance. This may be due to the child’s age or trauma suffered, among various other reasons. Parents of a child victim play a crucial role in detecting and reporting crimes, providing information and assisting law enforcement in the investigation or prosecution of the crime committed against the child. Recognizing this, an alien parent can apply to be recognized as an “indirect victim” if the principal victim is a child under 21 years of age and is incompetent or incapacitated to provide assistance to law enforcement in the investigation or prosecution of the crime committed against the child or if the child is deceased due to murder or manslaughter. The immigration status of the child victim is not relevant to this determination.”²⁴

13. The criminal has not been convicted

“A current investigation, the filing of charges, a prosecution or conviction are not required to sign the law enforcement certification.”²⁵ “There is no statutory or regulatory requirement that an arrest, prosecution, or conviction occur for someone to be eligible to apply for a U visa.”²⁶

14. The victim never testified

“As mentioned above, there is no requirement that an arrest, prosecution, or conviction occur for someone to be eligible for a U visa. While there is no requirement for the victim to testify at a trial to be eligible for a U visa, if the victim is requested to testify, he or she cannot unreasonably refuse to cooperate with law enforcement.”²⁷ If a victim chooses not to testify because she is not requested to do so or because her fear of retaliation from the perpetrator is not unreasonable, the victim can be granted a U visa and can receive certification. See number 5 above for the DHS factors considered in determining whether a victim’s refusal to cooperate was unreasonable.

15. Agency did not want to certify due to concern about liability

“A certifying law enforcement agency/official cannot be held liable for the future actions of a victim for whom the agency signed a certification or to whom DHS granted a U visa. The U visa certification simply states that the person was a victim of a qualifying crime, possessed information relating to the crime, and was helpful in the investigation or prosecution of that

²³ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 14, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_vis_a_certification_guide.pdf/view

²⁴ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 13, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_vis_a_certification_guide.pdf/view

²⁵ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 4, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_vis_a_certification_guide.pdf/view

²⁶ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 11, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_vis_a_certification_guide.pdf/view

²⁷ DEP’T OF HOMELAND SEC. *U Visa Law Enforcement Certification Resource Guide* at 11, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_vis_a_certification_guide.pdf/view

crime. The certification does not guarantee the future conduct of the victim or grant a U visa. USCIS is the only agency that can grant a U visa. If a victim is granted a U visa and is later arrested or commits immigration violations, federal immigration authorities will respond to those issues.”²⁸

16. Victim has a removal order or is in removal proceedings

“Individuals currently in removal proceedings or with final orders of removal may still apply for a U visa. Absent special circumstances or aggravating factors, it is against U.S. Immigration and Customs Enforcement (ICE) policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime. To avoid deterring individuals from reporting crimes, ICE has issued guidance to remind ICE officers, special agents, and attorneys to exercise all appropriate discretion on a case-by-case basis when making detention and enforcement decisions in the cases of victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints. Particular attention should be paid to victims of domestic violence, human trafficking, or other serious crimes, and witnesses involved in pending criminal investigations or prosecutions.”²⁹

17. Victim no longer in the U.S.

“While the crime must have occurred in the United States, its territories, or possessions, or have violated U.S. law, victims do not need to be present in the U.S. in order to be eligible for a U visa and may apply from outside the United States.”³⁰

18. Agency has no certification policy

DHS authorizes the head of the certifying agency to sign certifications and to designate any person(s) in the agency with a supervisory role to sign certifications. DHS encourages but does not require “certifying agencies to develop internal policies and procedures so that certifications are properly vetted.”³¹ “DHS does not endorse or recommend any particular practice, as the certifying agency has the sole authority on the policies and procedures it will use in signing law enforcement certifications.”³² When the head of an agency designates a supervisor to sign certifications, best agency practices include providing the immigrant victim applying for the U visa a copy of a letter signed by the head of the agency noting that the person signing the U visa in the victim’s case has been designated to be a U visa certifier.³³

²⁸ DEP’T OF HOMELAND SEC. U Visa Law Enforcement Certification Resource Guide at 10, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

²⁹ DEP’T OF HOMELAND SEC. U Visa Law Enforcement Certification Resource Guide at 9, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

³⁰ DEP’T OF HOMELAND SEC. U Visa Law Enforcement Certification Resource Guide at 10, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

³¹ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule; 72 Fed. Reg. 53014, 53023 (September 12, 2007)

http://niwaplibrary.wcl.american.edu/immigration/u-visa/regulations/UVISA_interim-regs-Fed-Reg.pdf/view

³² DEP’T OF HOMELAND SEC. U Visa Law Enforcement Certification Resource Guide at 8, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

³³ I sample designation letter is available at, <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/tools/police-prosecutors/u-visa-certification-forms-for-law-enforcement/U-Visa-SAMPLE-DESIGNEE-LETTER.doc/view>

Through technical assistance, we have also identified other issues raised by some of the agencies. The issues, along with the DHS response, are listed below:

19. An agency will not complete certification once a case has been filed with the district attorney.

DHS states that a crime victim could be eligible to receive U visa certification even when the case is closed, and before or after the case has been referred to prosecutors, as well as before or after trial whether or not the prosecution resulted in a conviction.³⁴ DHS lists a number of certifying agencies with authority to sign U visa certification. These agencies include all authorities responsible for the “investigation, prosecution, conviction or sentencing of the qualifying criminal activity.”³⁵ Thus, as long as agency meets the aforementioned requirement, it has and continues to retain the power to certify a U visa, regardless of the status of the case and whether or not another agency that could serve as a certifying official is involved with the case.

20. The agency will not certify relatives of victims that are deceased due to murder, manslaughter, or are incompetent or incapacitated and are unable to assist in the investigation and prosecution process.

DHS’ definition of a victim includes certain family members of deceased, incapacitated, or incompetent victims.³⁶ DHS recognized that granting the U visas only to the victims could lead to separation of families, which was never the intent of this regulation.³⁷ Moreover, family members frequently have valuable information regarding the criminal activity that would not otherwise be available to law enforcement officials because the direct victim is deceased, incapacitated, or incompetent.³⁸ Thus, DHS encourages these family members to fully participate in the investigation or prosecution, and extends U visa benefits to them.

21. The petitioner must make application within sixty days of the criminal offense being reported.

DHS explicitly provides that there is no statute of limitations regarding the time frame in which the crime must have occurred.³⁹ Furthermore, the federal legislation provides that a victim may be eligible for a U visa based on “having been helpful *in the past* to investigate or prosecute a crime.”⁴⁰

22. The petitioner must submit documentation from a certified medical facility (counseling center, treatment facility, or medical care center) verifying that the individual suffered

³⁴ DEP’T OF HOMELAND SEC. U Visa Law Enforcement Certification Resource Guide at 10, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u visa certification_guide.pdf/view

³⁵ DEP’T OF HOMELAND SEC. U Visa Law Enforcement Certification Resource Guide at 2-3, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u visa certification_guide.pdf/view

³⁶ *Id.*

³⁷ DEPT. OF HOMELAND SEC. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53,017 (Sept. 17, 2007). http://niwaplibrary.wcl.american.edu/immigration/u-visa/regulations/UVISA_interim-regs-Fed-Reg.pdf/view

³⁸ *Id.*

³⁹ DEP’T OF HOMELAND SEC. U Visa Law Enforcement Certification Resource Guide at 10, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u visa certification_guide.pdf/view

⁴⁰ *Id.*

substantial physical and mental abuse as a result of having been a victim of a qualifying criminal activity.

USCIS is tasked with making the determination as to whether the victim has met the “substantial physical or mental” during its adjudicating of the U visa petition.⁴¹ Certifying law enforcement agencies do not make this determination.⁴²

A law enforcement agency is responsible of certifying whether the person they encountered was in fact a victim of a qualifying crime, was helpful in detection, investigation, or prosecution of the crime, and had knowledge and detail of the crime.⁴³ USCIS then conducts background and security checks on U visa petitioners and reviews all available information concerning arrests, immigration violations, and security issues before making a final decision.⁴⁴ Hence, a law enforcement agency need not concern itself with requiring a victim to provide proof of their abuse.

Although the victim will have to provide evidence to USCIS regarding the substantial physical or mental abuse,⁴⁵ the evaluation of the sufficiency of the evidence, and the weight provided the evidence submitted, is a determination made by DHS.⁴⁶ USCIS adjudication officers receive “extensive training in statutory and regulatory requirements in determining whether a victim has suffered substantial physical or mental abuse.”⁴⁷ These officers have training in “any credible evidence” standard of proof that applies in all U visa, VAWA and T visa adjudications.⁴⁸ This federal immigration law evidentiary standard was created to bar DHS from mandating that specific forms of evidence be submitted in VAWA, T, U and battered spouse waiver cases, which the above approach attempts to do.⁴⁹ Since DHS could not insist that a victim submit documentation from a certified health professional, the Certifying agency would be incorrect in imposing a requirement that is impermissible under federal immigration law.

⁴¹ DEP’T OF HOMELAND SEC. U Visa Law Enforcement Certification Resource Guide at 11, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

⁴² *Id.*

⁴³ Blue Campaign: Law Enforcement Discussion of Immigration Relief (Apr. 2013), at 4:02-5:29, available at, <http://niwap.org/training/DHS-roll-call/>

DEP’T OF HOMELAND SEC. U Visa Law Enforcement Certification Resource Guide at 6, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

⁴⁴ DEP’T OF HOMELAND SEC. U Visa Law Enforcement Certification Resource Guide at 14, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

⁴⁵ DEP’T OF HOMELAND SEC. U Visa Law Enforcement Certification Resource Guide at 11, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

⁴⁶ Blue Campaign: Law Enforcement Discussion of Immigration Relief (Apr. 2013), at 4:02-5:29, available at, <http://niwap.org/training/DHS-roll-call/> (Video No. 2)

⁴⁷ DEP’T OF HOMELAND SEC. U Visa Law Enforcement Certification Resource Guide at 11, available at, http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf/view

⁴⁸ Leslye E. Orloff, Kathryn C. Isom, Edmundo Saballos, *Mandatory U-Visa Certification Unnecessarily Undermines The Purpose Of The Violence Against Women Act’s Immigration Protections and Its “Any Credible Evidence” Rules—Acall For Consistency*, XI GEORGETOWN J. GENDER & LAW 619, 621 (2010).

⁴⁹ The Immigration and Naturalization Service in 8 C.F.R. § 216.5(e)(3)(iv)-(vii) (2001) attempted to impose a similar restriction that Congress explicitly overruled in VAWA in over ruled by statute 1994. VAWA1994 § 40702, 8 U.S.C. § 1186a(c)(4)(C); INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).